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Supreme Court, U.S.
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No. 85-1423

In The
Supreme Court of the United States
October Term, 1985

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al.,
Petitioners,

v.

RODNEY S. QUINN, SECRETARY OF STATE, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In this case, a trade association of motor carriers, the Private Truck Council of America, and two Pennsylvania-based motor carriers ("Petitioners"), challenged the constitutionality of the Maine reciprocal truck tax, 22 M.R.S.A. § 2243-C. This tax "reciprocates", in that it applies a special tax—called a "third structure" tax—on carriers registered in a foreign state, if the foreign state imposes a third structure tax on Maine-registered carriers. (Third structure taxes are charges other than the traditional registration fees and fuel use taxes). Thirteen states other than Maine impose these third structure taxes; and the taxes take a number of different forms. The Maine reciprocal tax mirrors these taxes, and thus the type of reciprocal tax that Maine imposes on an individual foreign carrier depends on the type of third structure tax that its state of registry extends to Maine carriers. The Maine Secretary of State has adopted regulations implementing § 2243-C for carriers from the thirteen states that impose third structure taxes. (These regulations are reproduced as Appendix A, App. 1-App. 7, *infra.*)

Revenues from Maine's tax are earmarked for the State's Highway Fund, and used for road building, repair and maintenance and highway administration. 29 M.R.S.A. § 2243-C; 23 M.R.S.A. § 1651-53. Besides its fiscal purpose, § 2243-C has the primary regulatory objective of deterring states without third structure taxes from instituting them, and persuading the thirteen states with such taxes either to repeal them or enter into a reciprocal waiver with Maine. Because in its necessary operation, the tax falls only on carriers registered in other states, Petition-

ers challenged § 2243-C as, *inter alia,* a discrimination against interstate commerce and therefore pre-empted by the Commerce Clause, Article I, Sec. 8, Cl. 3 of the Constitution.

Petitioners filed their complaint, styled as a class action, on December 17, 1984, approximately eight months after § 2243-C was enacted. Two days later, they asked the Superior Court either to enjoin further tax collections, or to place the proceeds of collection in escrow *pendente lite* in order to preserve their claim for a refund if they prevailed on their challenge. The latter request was based on the authority of *American Trucking Association v. Quinn,* 437 A.2d 623, 625 (Me. 1981) (*Quinn I*) and *American Trucking Association v. Quinn,* 466 A.2d 1266, 1267 (Me. 1983) (*Quinn II*). The State agreed to the escrow of further tax collections *pendente lite,* recognizing that sovereign immunity would otherwise bar the claim for a refund of taxes paid prior to judgment. By consent of all parties, the Superior Court entered an order for the escrow of further tax collections, for "(t)he express purpose . . . (of) ensur(ing) a refund mechanism if the Court finds that such monies were wrongfully or illegally charged and collected by defendants." (The escrow order of January 2, 1985 is reproduced as Appendix C, App. 18-App. 19, *infra.*)

Some months thereafter, Petitioners moved for summary judgment, arguing that the tax was facially invalid under, *inter alia,* the Commerce Clause. Petitioners also asked for a class-wide refund of all taxes paid, and for attorneys fees, from any "common fund" recovered and/or under 42 U.S.C. § 1988. The State opposed the summary judgment motion on the merits. On the matter of remedy, the State objected to a refund insofar as it em-

braced tax revenues collected prior to the escrow order. The State agreed that an award of attorneys fees from any "common fund" recovered was appropriate if Petitioners prevailed, but the State opposed fees under 42 U.S.C. § 1988.

The Superior Court certified the action as a class action, and granted the motion for summary judgment, finding the statute to be invalid under the Commerce Clause. Pet. for Cert., pp. 16a-17a. The court directed that the escrowed funds be returned to the taxpayers, and that Petitioners' counsel receive their attorneys fees from the funds. Pet. for Cert., p. 20a. The court rejected the prayer for a refund of taxes paid prior to its escrow order,[1] denied the request for § 1988 attorneys fees, and declined to enter an injunction against further enforcement of the tax.[2] Pet. for Cert., p. 20a.

Petitioners appealed the Superior Court's order on these last three points, and the State cross-appealed on the merits. The Supreme Judicial Court of Maine, sitting as the Law Court, affirmed the lower court's decision in all respects. Pet. for Cert., pp. 1a-13a. Mandate has since issued. The case is again before the Superior Court for the determination of a refund procedure and an assessment

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[1] As of October 7, 1985, the escrowed funds amounted to $257,832. Prior to the escrow order, the State had collected $102,794 under the challenged statute. The larger amount—$700,000—referenced in the Petition for Cert., at p. 15, n.11, reflects revenues collected under a former, somewhat similar statute, 1983 Public Laws, Ch. 94, Pt. C, § 9, that had been repealed eight months prior to this suit. The complaint (reproduced as Appendix B, App. 8-App. 17, *infra*) does not challenge or mention this former statute.

[2] The State had represented to the trial court that its officials would abide by any final judgment that declared the reciprocal tax unconstitutional.

of attorneys fees. The State has ceased to solicit tax payments under the reciprocal tax.

REASONS FOR DENYING THE WRIT

I. The Application Of 42 U.S.C. § 1983 To Claims Under The Commerce Clause Is Neither An Issue As To Which There Is A Genuine Conflict Among The Circuits Nor An Important Question Of Law.

Petitioners assert that their Commerce Clause challenge to Maine's reciprocal tax is actionable under 42 U.S.C. § 1983, and that having prevailed on this claim, § 1983 entitles them to a refund of taxes paid prior to the escrow order and attorneys fees under 42 U.S.C. § 1988. Pet. for Cert., p. 15. The decisions of this Court, however, clearly foreclose the claim under § 1983 for the refund of taxes paid prior to the escrow order, sovereign immunity standing as a bar. *Edelman v. Jordan,* 415 U.S. 651, 677 (1974); *Quern v. Jordan,* 440 U.S. 332, 341 (1979). *See Thiboutot v. State,* 405 A.2d 230, 237 (Me. 1979), *affirmed sub nom., Maine v. Thiboutot,* 448 U.S. 1 (1980). Thus, only the matter of attorneys fees under 42 U.S.C. § 1988 turns on the question raised by Petitioners.[3]

The conflict among the circuits on this question is, at best, insubstantial, and certainly not of the type to make this case deserving of further review. To warrant a writ,

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[3] Actually, only the source of the attorneys fees to be paid are at issue. The trial court awarded fees to Petitioners' counsel, directing that they be satisfied out of the proceeds of the escrow fund recovered for the class. Pet. for Cert., p. 20a. If the Petitioners' Commerce Clause claim were actionable under § 1983 and attorneys fees under § 1988 were recoverable, the State would have to pay these fees separately. The litigation at this point is thus a species of what four members of this Court described as "one of the least socially productive types of litigation imaginable." *Hensley v. Eckerhart,* 461 U.S. 424, 442 (1983) (Brennan, J. concurring in part and dissenting in part).

there must be a "real or 'intolerable' conflict on the same matter of law or fact, and not merely an inconsistency in dicta. . . ." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.3 (6th ed. 1986). The conflict here, however, arises principally from a terse remark in a footnote of the Third Circuit's opinion in *Kennecott Corp. v. Smith,* 637 F.2d 181, 186, n.5 (3rd Cir. 1980), stating that claims under Commerce Clause and the Williams Act are actionable under § 1983. There was no considered discussion of the question, the answer being more assumed than held, and the remark was dictum, for the injunction sought in that case was sustainable on grounds other than the § 1983 exception to the Anti-Injunction Act.[4]

By contrast, the decision on which the Maine Supreme Judicial Court relied, *Consolidated Freightways Corp. v. Kassel,* 730 F. 2d 1139, 1144-47 (8th Cir.), *cert. denied* — U.S. —, 105 S.Ct. 126 (1984), exhaustively treated the

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[4] In the other cases cited by Petitioners, *Confederated Salish and Kootenai Tribes v. Moe,* 392 F. Supp. 1297 (D. Mont. 1975), *affirmed on other grounds,* 425 U.S. 463 (1976), an Indian tribe and some of its members challenged a Montana tax partly on Commerce Clause grounds. A three-judge District Court found jurisdiction over the tribal claims under 28 U.S.C. § 1362, and, without further analysis, found jurisdiction over the individual claims under 28 U.S.C. § 1343(3) because the "alleged violation of Commerce Clause rights" stated a claim under § 1983. This Court affirmed the jurisdictional holdings with regard to the tribal claims under § 1362, but found it unnecessary to determine the correctness of the holding that § 1343(3) provided jurisdiction over the individual claims. In a footnote, however, this Court reminded the lower court than in further proceedings the claims of the individual plaintiffs "must be properly grounded jurisdictionally." 425 U.S. at 468-69, n.7 (cit. om.). The lower court's decision, of course, predates this Court's decisions in *Chapman v. Houston Welfare Rts. Org., infra; Pennhurst State School and Hospital v. Haldeman, infra* and *Middlesex Cty. Sew. Auth. v. National Sea Clammers Assn., infra.*

question in light of this Court's pronouncements, first, in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-15 (1979), that claims under the Supremacy Clause do not rise to the level of a claim of "right" "secured by the Constitution", and subsequently, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981) and *Middlesex Cty. Sew. Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 19 (1981), that § 1983 creates a remedy only where the statutory provision on which a claim is founded "secures" a "right". Interpreting § 1983 in light of these decisions and the developing jurisprudence under the Commerce Clause, the Eighth Circuit held that the Commerce Clause "deals with the relationship between state and national interests, not the protection of individual rights," and thus did not confer a right actionable under § 1983. *Consolidated Freightways*, 730 F. 2d at 1144-47.

To our knowledge, no circuit court and no state court of last resort has relied on the dictum in *Kennecott*. By

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[5] As noted above, this Court denied a petition for certiorari in the *Consolidated Freightways* case. — U.S. —, 105 S. Ct. 126 (1984). The petition for certiorari in that case raised the same issue as the instant petition. In particular, Consolidated Freightways argued in its petition that the decisions in *Kennecott Corp. v. Smith* and *Confederated Salish and Kootenai Tribes v. Moe* conflicted with the decision of the Eighth Circuit, and

> thus there exists a conflict among the lower courts as to whether 42 U.S.C. § 1983 applies to a violation of an individual's rights under the Commerce Clause. The decision of the Eighth Circuit is equally, of course, in conflict with the previous statements of this Court describing the right as a Constitutionally secured one.

Petition for a Writ of Certiorari, Dkt. No. 83-2119, at pp. 11-12.

Nothing has transpired since this Court denied certiorari on this question in *Consolidated Freightways* that would warrant a different outcome in this case.

contrast, the decision in *Consolidated Freightways* has been followed by all courts that have subsequently addressed the issue. *J & J Anderson, Inc. v. Town of Erie*, 767 F. 2d 1469, 1476-77 (10th Cir. 1985) (neither Commerce Clause nor Supremacy Clause secures rights actionable under § 1983); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor & Human Relations*, 750 F. 2d 608, 615-16 (7th Cir. 1984), *probable jurisdiction noted on other grounds*, — U.S. —, 105 S.Ct. 2356 (1985) (Supremacy Clause does not secure rights actionable under § 1983); *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 748 (D. Wash. 1985) (Supremacy Clause does not secure rights actionable under § 1983). The asserted "conflict" among the courts, even if it were genuine, is thus of no continuing moment.[6]

II. The Denial Of Refunds Of Taxes Collected Prior To The Escrow Order Does Not Conflict With Decisions Of This Court.

This Court has held that a state may not, consistent with the Fourteenth Amendment, refuse to refund taxes exacted in violation of the laws or Constitution of the

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[6] There is in any event no reason to believe that Congress intended to embrace claims under the Commerce Clause within the ambit of § 1983. As Petitioners note, Pet. For Cert., p. 14, n.10, long before the progenitor of § 1983 was enacted in 1871, private litigants had resort to the courts to assert the claim that state statutes affecting them transgressed the Commerce Clause. *See Passenger Cases* (*Norris v. City of Boston*), 7 How. (48 U.S.) 283, 409-10 (1848); *cf., Brown v. Maryland*, 12 Wheat. (25 U.S.) 213 (1827). There was no need for Congress to create an additional remedy for such claims in the 1871 Civil Rights Act. It is equally unlikely that Congress, in enacting 42 U.S.C. § 1988, "[t]he purpose of [which] is to ensure 'effective access to the judicial process', *Hensley v. Eckerhart*, 461 U.S. at 429, intended to reverse the American rule against fee shifting for cases which historically had "effective access" to the judicial process.

United States *by compulsion. Ward v. Love County,* 253 U.S. 17, 23 (1920); *Carpenter v. Shaw,* 280 U.S. 363, 369 (1930). In this case, the Maine Supreme Judicial Court acknowledged these decisions, and expressly held that Maine common law is consistent with them, the common law allowing a taxpayer to recover taxes exacted under an invalid statute if the taxpayer shows that he paid under compulsion. The court found no evidence of compulsion in this case—no arrest, prosecution or seizure of property had been instituted or threatened—and thus the court denied the claim for refund, insofar as it embraced taxes collected prior to the escrow order. Pet. for Cert., pp. 6a-8a.

Petitioners seek to challenge this finding, arguing that, as a matter of constitutional law, they must be found to have paid the tax under compulsion because § 2243-C authorizes criminal penalties for non-payment.[7] This case, however, does not properly present this issue. Petitioners neither alleged in their complaint nor submitted any evidence that the criminal nature of the author-

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[7] The statute provides that non-payment is a Class E crime. For corporations such as these Petitioners, the maximum penalty for conviction of a class E crime is $5,000. 17 M.R.S.A. § 1301 (1)(E).

Petitioners imply that carriers who do not pay the tax *ipso facto* forfeit their right to do business in the State. Pet. for Cert., p. 17. The implication is not accurate. The regulations speak in terms of vehicles, not corporations who own or lease them. The regulations provide that no vehicle subject to the tax may operate in the state without registering first. App. 3, *infra.* (There is no fee imposed for registering). The operator of the registered vehicle must make a quarterly report and pay the taxes due at the time. App. 6-App. 7. Failure to pay the tax for that vehicle will subject that *vehicle* to cancellation of its registration. App. 4-App. 5.

ized penalties for non-payment influenced their decision to pay the tax before challenging it. (The Amended Complaint, on which this suit proceeded, is reproduced as Appendix B, App. 8-App. 17, *infra.*) There is no allegation or evidence that Petitioners paid under protest. Most significantly, there is neither an allegation nor any proof that Petitioners could not practically have brought their challenge to the state's reciprocal tax prior to making tax payments.[8]

Second, while the Fourteenth Amendment mandates that illegal taxes be refunded to taxpayers who show that they actually paid under compulsion, no decision of this Court holds that as a matter of federal constitutional law compulsion must be implied from the mere possibility of criminal prosecution for non-payment. The version of the implied duress doctrine for which Petitioners contend is a common law notion that some states have embraced while others have not. *See* 72 Am.Jur.2d *State and Local Taxation,* §§ 1094, 1105 (1974). Petitioners argue that this Court adopted some version of the implied duress doctrine as constitutional law in *Atchison, Topeka and Santa Fe Ry. Co. v. O'Connor,* 223 U.S. 280 (1912). But that decision should be understood as resting on the common law, not

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[8] The only record evidence on these points indicates that Petitioners were not influenced to pay the tax by the possible penalties for non-payment, for it appears that the individual class representatives were occasionally operating in Maine without paying the tax beforehand. Affidavit of Carolyn Manson, ¶¶ 8-15. (The Affivadit of Carolyn Manson is reproduced as Appendix D, App. 20-App. 24, *infra*). And the fact that Petitioners made tax payments without protest for over a year before bringing this challenge belies the suggestion that they paid the tax under duress.

the Fourteenth Amendment, having been rendered in the pre-*Erie* period[9] when federal courts applied the general law of their own choosing, not controlling state law.

Moreover, the Court's decision in *Atchison, Topeka & Santa Fe Ry.* presupposed that the taxpayer had no effective remedy prior to paying the tax, the common law at that time precluding injunctions against the enforcement of the tax except in extraordinary circumstances. 223 U.S. at 285. By the time of suit in this case, however, the courts in Maine had allowed a taxpayer without a statutory refund option to preserve a refund claim through the procedure that was used here—an escrow of tax receipts *pendente lite*. *See American Trucking Assn. v. Quinn, supra.* In this case, the State consented to the escrow arrangement. That Petitioners' refund was less than complete is attributable not to the absence of a remedy but to their own delay in bringing suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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9 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

APPENDICES

APPENDIX A

DEPARTMENT OF FINANCE AND ADMINISTRATION

DEPARTMENT OF THE SECRETARY OF STATE

Motor Vehicle Division

DEPARTMENT OF TRANSPORTATION

Chapter 150 Joint Rules Governing Collection of Reciprocal Taxation of Motor Vehicles

SUMMARY: This chapter contains provisions setting forth specifically jurisdictions for which reciprocal motor vehicle taxation has been imposed, persons subject to taxation, and the means of collecting and enforcing such taxation.

1. *Computation of Tax*

Taxation imposed pursuant to 29 M.R.S.A. § 2243-C, *enacted by* Public Law Chapter 818 (effective April 24, 1984), shall be calculated by the same methods used in taxed vehicles' jurisdictions of registration. For each such jurisdiction, there follows a general description of the applicable tax. Insofar as practicable, the Secretary of State, with the assistance of the State Tax Assessor and the Department of Transportation, shall use pertinent provisions of the law of these jurisdictions to determine the amount of taxation due, so that that amount will be commensurate with the amount imposed upon Maine-registered vehicles traveling in the appropriate foreign jurisdiction.

Jurisdiction	*Description*
Arkansas	Use Equalization
Colorado	Ton-Mile
Idaho	Weight-distance
Kentucky	Weight-distance
	Fuel surcharge
Mississippi	Fuel surcharge
Nevada	Unladen weight-distance
New Mexico	Weight-distance
New York	Use
Ohio	Axel-mile
Oregon	Weight-mile
Pennsylvania	Axel
Virginia	Fuel surcharge
Wyoming	Ton-mile

2. *Persons Liable to Enroll, Report and Pay Tax*

A. The person in whose name a vehicle is registered for highway use shall be liable to enroll for tax payment, report and pay tax, except in the following cases:

1. When a person operates a vehicle in this State under an operating authority, the holder of the operating authority shall be liable to enroll, report and pay tax.

2. When a for-hire carrier transfers the control and operation of a vehicle to another by written lease, the lessee shall be liable to enroll, report and pay tax.

B. If the holder of an operating authority under subsection (A)(1) or the lessee under subsection (A)(2) fails to enroll, report and pay tax, the person in whose name a vehicle is registered shall be liable to enroll, report and pay tax.

C. If the person in whose name a vehicle is registered for highway use fails to enroll, report and pay tax, any person who operates the vehicle in this State shall be liable to enroll, report and pay tax.

3. *Enrollment; Vehicle Identification Decal*

Before any vehicle subject to a tax under section 1 is operated in this State, the person liable pursuant to section 2 shall enroll for purposes of tax payment and apply for a vehicle identification decal. Enrollment and application shall be made simultaneously on a form and in a manner prescribed by the Secretary of State and shall in every instance include furnishing the vehicle identification number (VIN) and whatever other information the Secretary of State deems necessary. Upon acceptance of an enrollment and application, the Secretary of State shall issue an identification decal for each enrolled vehicle.

Enrollments and vehicle identification decals shall be valid until December 31st next following the date of issuance. During the period of enrollment, an identification decal shall be affixed to the exterior of an enrolled vehicle in a location and manner the Secretary of State shall specify.

4. *Cancellation of Enrollment*

Notwithstanding the availability of any other enforcement authority, the Secretary of State may cancel the enrollment pursuant to section 3 of a motor vehicle in any of the following circumstances:

A. Failure to file a report with payment within thirty (30) days after the due date pursuant to

section 6. The Secretary of State shall mail the person liable for the tax a written notice allowing fifteen (15) additional days after such mailing for reporting and payment.

B. Failure to pay an additional sum determined due by the Secretary of State pursuant to section 6. The Secretary of State shall mail the person liable for such sum a second notice or reminder allowing fifteen (15) additional days after such mailing for payment.

C. Failure to produce records for examination or audit pursuant to section 6.

In cases under section 6 for which vehicle fleet reporting has been allowed, the Secretary of State may cancel enrollment for all vehicles in a fleet when there has been a failure to file a report or make payment.

Cancellation of any vehicle's enrollment pursuant to this section shall require re-enrollment, re-application for a vehicle identification decal, and payment of any tax due pursuant to 29 M.R.S.A. § 2243-C and these rules, before that vehicle is operated in this State.

5. *Records*

Every person liable pursuant to section 2 must maintain an accurate record of all operations of taxed vehicles in this State. This record shall be in a form consistent with the record-keeping requirements imposed by the law of such vehicle's jurisdiction of registration upon Maine-registered vehicles traveling therein. Such records shall be maintained for a period of three (3) years

or such longer time as the Secretary of State may require. Such records shall be subject to audit and examination within or outside the State by the Secretary of State or the Secretary of State's designee and must be produced no later than thirty (30) days after a request for production for audit or examination.

6. *Reports; Payment*

Each person subject to a tax under section 1, shall, not later than the last day of April, July, October, and January, file with the Secretary of State, on forms prescribed by the Secretary of State, a report which shall include a computation of tax due. The tax is due at the time the report is required to be filed and shall be remitted to the Secretary of State for deposit in the State Highway Fund. Regardless of whether any tax is due, a report shall be filed for every enrolled vehicle, except that a report for a vehicle fleet may be filed in instances for which the Secretary of State deems such information sufficient. The Secretary of State may deem vehicle fleet statistics to be sufficient in instances in which such information would be sufficient to satisfy comparable reporting requirements of the jurisdiction of vehicle registration.

When an election as to method of tax payment is available in accordance with the Secretary of State's determinations pursuant to section 1, such election with the first report for a vehicle shall control subsequent reports for an enrollment period.

If, subsequent to a payment of tax, the Secretary of State determines that an additional sum is due, the Sec-

retary of State shall by written notice demand payment of such amount within thirty (30) days.

If, after an audit or examination of records pursuant to section 5, the Secretary of State determines that an additional tax payment is due, the Secretary of State shall by written notice demand payment of such amount within thirty (30) days.

7. *Report to Legislature*

Prior to the 31st day of January of each year, the Department of Finance and Administration, Department of the Secretary of State, and Department of Transportation shall jointly file an annual report with Chairpersons of the Legislature's Committees on Taxation and Transportation. The report shall summarize activity by these departments in carrying out the purposes of 29 M.R.S.A. § 2243-C during the previous calendar year, and it shall include a listing of jurisdictions for which a tax is applicable and an accounting of revenues raised and expenditures made.

BASIS STATEMENT: The Department of Finance and Administration, Department of the Secretary of State, and Department of Transportation adopt the foregoing rules pursuant to the Legislative directive of 29 M.R.S.A. § 2243-C, *enacted by* Public Law Chapter 818 (effective April 24, 1984). Chapter 818 established third structure reciprocal taxation for motor vehicles. These rules enumerate the jurisdictions for which this taxation is effective; require reference to those jurisdictions taxing authority to determine taxation imposed by Maine; clarify what persons are responsible for paying this tax; and out-

line the procedure for enrolling for payment, reporting, and payment by responsible persons.

In response to the Notice of Rulemaking Proposal published in newspapers throughout the State and mailed to specific interested parties, the Departments received a comment from William S. Fulcher, Director of the Motor Carrier Division of the State Corporation Commission, Commonwealth of Virgina, discussing the object of Virginia's fuel surcharge. The Departments determined that the information provided by Mr. Fulcher was not inconsistent with the Rules as proposed.

On advice of the Attorney General, the Departments deleted original section 7 from the Rules and renumbered remaining sections appropriately, in order to avoid conflict with case law regarding tax refunds.

Authority: 29 M.R.S.A. § 2243-C

Effective Date: November 11, 1984

APPENDIX B

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,

and

CIRCLE W TRANSPORTATION, INC.

and

W. H. CHRISTIE & SONS, INC.,
Individually and on Behalf of Themselves and
and All Others Similarly Situated,

Plaintiffs

v.

RODNEY S. QUINN, Individually and as
Secretary of State,

and

LINWOOD ROSS, Individually and as Deputy
Secretary of State, Motor Vehicles,

and

RODNEY L. SCRIBNER, Individually and as
Commissioner of Finance and Administration,

and

DANA F. CONNORS, Individually and as
Commissioner of Transportation,

and

ALAN N. WEEKS, Individually and as Chief of
the State Police for the State of Maine,

and

ARTHUR A. STILPHEN, Individually and as
Commissioner of Public Safety for the State of Maine,

and

SAMUEL SHAPIRO, Individually and as Treasurer for the State of Maine,

and

GEORGE N. WHALEN, Individually and as Chief Enforcement Officer of the Secretary of State's Office for the State of Maine,

Defendants

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, on behalf of themselves and all others similarly situated, hereby complain against defendants as follows:

1. In this class action, plaintiffs seek declaratory and injunctive relief and refunds of unlawfully exacted fees and taxes on behalf of themselves and all others similarly situated. Plaintiffs challenge the lawfulness of 29 M.R.S.A. § 2243-C (hereinafter "Section 2243-C"), under which the defendants have imposed "retaliatory" taxes and fees on motor carriers registered in other states. Because these taxes and fees are not imposed on motor carriers registered in Maine, and because they vary in amount according to state of vehicle registration, plaintiffs contend that they discriminate against interstate commerce, and otherwise violate plaintiffs' rights under the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution; Article I, Section 6-A of the Maine Constitution; and Section 1983 of Title 42 of the U.S. Code.

PARTIES

2. Plaintiff Private Truck Council of America, Inc. (PTCA), is a nonprofit business association incorporated under the laws of New York State. It has its principal place of business in Washington, D.C. PTCA is comprised of over 1,800 companies presently operating trucks and related equipment as private carriers within the scope and in furtherance of their own manufacturing, processing or other businesses, and associated companies. A large number of PTCA's member companies, operating thousands of vehicles in interstate commerce through the state of Maine, register their vehicles in states against which Maine retaliates under the authority contained in Section 2243-C. As such, these companies have been or will be required to pay the retaliatory taxes and fees imposed by the defendants.

3. Plaintiff Circle W Transportation, Inc., a wholly-owned subsidiary of Westinghouse Electric Corporation, is a Delaware corporation with its principal place of business in North Huntingdon, Pennsylvania. It operates 15 vehicles, all of which are duly authorized to operate in the State of Maine. Those vehicles are registered in Pennsylvania and are therefore subject to the retaliatory taxes and fees imposed pursuant to Section 2243-C.

4. Plaintiff W. H. Christie & Sons, Inc. is a New York corporation with its principal place of business in Knox, Pennsylvania. Its vehicles are registered in Pennsylvania. It operates 25 vehicles, all of which are duly authorized to operate through the State of Maine, and is therefore liable for the retalitory tax imposed under Section 2243-C.

5. Defendant Rodney S. Quinn is the Main Secretary of State. Defendant Rodney L. Scribner is the Maine Commissioner of Finance and Administration. Defendant Dana F. Connors is the Maine Commissioner of Transportation. Defendant Alan N. Weeks is the Chief of the State Police for the State of Maine. Defendant Arthur A. Stilphen is the Commissioner of Public Safety for the State of Maine. Defendant George N. Whalen is the Chief Enforcement Officer of the Secretary of State's Office for the State of Maine. These defendants are the State officials who have authority, pursuant to 29 M.R.S.A. § 2243-C, to adopt rules and regulations implementing the retaliatory taxes and fees authorized in Section 2243-C, and to assess, collect, and enforce those retaliatory taxes and fees.

6. Defendant Samuel Shapiro is the Treasurer for the State of Maine. It is the State Treasurer who administers the State Highway Fund, into which the proceeds of the retaliatory taxes and fees imposed under Section 2243-C are deposited.

THE CLASS

7. Pursuant to Rule 23 of the Main Rules of Civil Procedure, plaintiffs bring this action on behalf of themselves and all other motor carriers which have operated or will operate vehicles through the State of Maine which are registered in states against which Maine retaliates pursuant to Section 2243-C, and which therefore have paid or will be required to pay the retaliatory taxes and fees imposed under that section. The parties comprising the plaintiff class include hundreds of interstate motor carriers and thus are so numerous as to make joinder

impracticable. The questions of law and fact are common to all members of the class and the plaintiffs will fairly and adequately represent the interests of all class members. Moreover, separate actions by individual members of the class would create the risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications, and the defendants have acted on grounds generally applicable to the class, making appropriate final declaratory and corresponding injunctive relief with respect to the class as a whole.

JURISDICTION

8. This Court has jurisdiction over this action under 4 M.R.S.A. § 105 and 14 M.R.S.A. § 5953.

FACTS

9. The State of Maine imposes several taxes and fees on motor carriers which operate within the State of Maine. Most of those are paid by all motor carriers which use the State's roads regardless of their state of registration. For example, Maine requires all carriers using its highways to obtain a fuel use identification decal for a fee of $15 per year. 29 M.R.S.A. § 246-A. Maine also imposes a tax of 14 cents per gallon on the consumption of motor fuel within the State. This tax is based on the percentage of a carrier's mileage in Maine and the amount of fuel consumed within the State. The fuel tax is paid by all motor carriers, including Maine-based carriers, regardless of their state of registration.

10. In addition to these taxes, the Maine Legislature recently amended the Main Motor Vehicle Code by adding a new tax solely on nonresident motor carriers as follows:

> So long as another jurisdiction imposes a tax or fee on a class of motor vehicles registered in Maine and traveling in that jurisdiction and that tax or fee is additional to those imposed by Maine upon the same class of motor vehicles but registered in that jurisdiction, the Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation acting together shall levy the same or substantially the same tax or fee upon the same class of motor vehicles registered in that jurisdiction and traveling in Maine.

29 M.R.S.A. § 2243-C.

11. Section 2243-C authorizes the defendants to monitor the taxes imposed on Maine carriers by other states and to adopt rules and regulations implementing retaliatory taxes and fees against carriers from other states as they see fit. The statute provides that the proceeds of the retaliatory taxes and fees collected under Section 2243-C shall be deposited in the State Highway Fund. The statute further provides that any person who fails to pay a tax or fee imposed under Section 2243-C shall be guilty of a Class E crime.

12. The defendants have already implemented a retaliatory tax of $36 per axle on vehicles registered in Pennsylvania, which many Pennsylvania carriers have already paid. In addition, beginning on January 1, 1985, the defendants will implement Section 2243-C by requiring nonresident motor carriers from a total of 13 states to pay retaliatory taxes and fees. The amounts of these fees and taxes range from $.02 per gallon of fuel consumed in

Maine for carriers whose vehicles are registered in Virginia, to $175 annually for carriers whose vehicles are registered in Arkansas. Nonresident carriers are required to pay these fees on a quarterly basis, except carriers with vehicles registered in Pennsylvania and Arkansas, which pay on an annual basis, and carriers with vehicles registered in New Mexico and Oregon, which are required to pay each time one of their vehicles enters the State.

13. Motor carriers whose vehicles are registered in the State of Maine pay no fees or taxes pursuant to Section 2243-C for their use of the State roads.

14. Plaintiff Circle W Transportation, Inc., many of whose vehicles are registered in Pennsylvania, operates in Maine and is subject to the retaliatory taxes imposed under Section 2243-C.

15. Plaintiff W. H. Christie & Sons, Inc., whose vehicles are registered in Pennsylvania, paid retaliatory taxes of $25 for the year 1984 pursuant to Section 2243-C. For the year 1983, W. H. Christie paid a total of $540 in retaliatory taxes pursuant to Section 2243-C. In addition, W. H. Christie continues to operate in Maine and thus will continue to be subject to the retaliatory tax imposed by Section 2243-C.

COUNT I

Unlawful Burden On Interstate Commerce

16. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

17. The retaliatory taxes and fees imposed on plaintiffs and the plaintiff class pursuant to Section 2243-C constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers whose vehicles are registered outside the State of Maine, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Maine. As such, Maine by its taxing scheme favors domestic enterprises over enterprises from other states. Maine's retaliatory taxes and fees further impose an unlawful burden on interstate commerce because they vary in amount depending on the particular state of vehicle registration. On their face, therefore, the taxes and fees discriminate against interstate commerce. Moreover, the amount of the taxes and fees does not bear a reasonable relationship to the services provided by the State in connection therewith.

COUNT II

Denial of Privileges and Immunities

18. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

19. The retaliatory taxes and fees imposed pursuant to Section 2243-C constitute a denial of the privileges and immunities of plaintiffs and the plaintiff class, whose vehicles are registered outside the State of Maine, because the taxes and fees are imposed on them solely because of their residence in another state. No comparable tax or fee is imposed upon residents of Maine. Accordingly, these

taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1, of the United States Constitution.

COUNT III

Maine Constitution

20. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

21. The actions or threatened actions of defendants set out above are or will deprive plaintiffs of life, liberty or property without due process of law, or deny plaintiffs the equal protection of the laws, in violation of Article I, Section 6-A of the Constitution of the State of Maine.

COUNT IV

42 U.S.C. § 1983

22. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

23. The actions of defendants set forth in Counts I and II above have been and will continue to be taken under color of state law, custom and usage and threaten to deprive plaintiffs of rights secured to them by the United States Constitution. Defendants are therefore liable to plaintiffs pursuant to 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court grant them:

(a) A declaratory judgment pursuant to 14 M.R.S.A. § 5951 *et seq.* declaring that the retaliatory taxes and fees authorized by 29 M.R.S.A. § 2243-C violate the United States Constitution, the Maine Constitution, and federal law and are therefore null and void;

(b) A permanent injunction enjoining the defendants from assessing or collecting retaliatory taxes and fees on nonresident motor carriers pursuant to 29 M.R.S.A. § 2243-C;

(c) Refunds of all retaliatory taxes and fees collected by the defendants prior to the effectiveness of this Court's judgment, with interest;

(d) Attorneys' fees and costs of this action; and

(e) Such other and further relief as This Court may deem just.

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Dated: January 21, 1985

APPENDIX C

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-562

PRIVATE TRUCK COUNCIL OF AMERICA. INC., et al

Plaintiffs

v.

RODNEY S. QUINN, et al

Defendants

ORDER FOR ESCROW OF FUNDS

This matter came before the Court on plaintiffs' motion for a preliminary injunction filed December 19, 1984. In support of their motion, plaintiffs filed a memorandum of law aand proposed Order for escrow of funds. On December 20, 1984, a hearing was held on plaintiffs' motion, and the parties appeared through counsel. Defendants objected to the notice of hearing. The Court allowed defendants until January 3, 1985 to respond to plaintiffs' motion.

Following the above notice, hearing, and objection of defendants, and with consent of the parties, the Court hereby ORDERS as follows:

1. All defendants, and all agents or other persons acting under defendants' direction, supervision, or control, are ordered to deposit into the escrow fund established hereunder all monies hereafter collected or received pursuant to Title 29 M.R.S.A. § 2243-C. At all times such monies collected or received shall be handled in a

manner which allows them to be identified as escrow fund monies and at no time shall such monies become a part of or deposited in the State Treasury. In collecting, receiving, or otherwise dealing with such monies, all defendants, and all agents or other persons acting under such defendants' direction, supervision, or control, shall be deemed to be acting pursuant to this Order and under the Court's jurisdiction. The express purpose of this provision of the Order is to ensure a refund mechanism if the Court finds that such monies were wrongfully or illegally charged and collected by defendants.

2. The defendant Mr. Samuel Shapiro, Treasurer for the State of Maine, is hereby appointed as escrow agent responsible for administering the escrow fund established hereunder.

3. The defendant escrow agent shall maintain adequate records which identify, by name, address, and dates and amounts of monies paid, all persons from whom monies have been received or collected for deposit in the escrow fund. Such records shall be made available to plaintiffs upon reasonable notice.

4. The defendant escrow agent shall invest all such escrow funds, and income accrued thereon, at commercially reasonable rates in a commercially reasonable and prudent manner.

5. All such monies and income earned thereon shall be held in escrow until further Order of this Court.

Dated: January 2, 1985

/s/ Morton Brody
Justice, Superior Court

A TRUE COPY: ATTEST

/s/ Pearl Valerie Page
Clerk of Courts

APPENDIX D

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-562

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al.

Plaintiffs

v.

RODNEY S. QUINN, Individually and as Secretary of State, et al.

Defendants

AFFIDAVIT OF CAROLYN MANSON

Carolyn Manson, having been sworn, now states under oath:

1. I am over 21 years of age and competent to testify to the matters set forth below. I make this affidavit from personal knowledge.

2. I currently serve as the division chief for the Division of Commercial Vehicle and Reciprocity of the Division of Motor Vehicles within the State Department for the State of Maine. The Division supervises the administration of fuel tax decals, commercial vehicle permits, and other road use fees such as that under challenge in this litigation, 29 M.R.S.A. § 2243-C.

3. The State of Maine imposes three types of fees and taxes on motor carriers, as described below.

4. First, the State imposes a registration fee that varies in amount with the size of the truck. *See* 29

M.R.S.A §§ 242-246. While the registration fee provisions by their terms apply to both in-state and out-of-state trucks, the State has separately negotiated reciprocal agreements with 46 states (Arizona, Hawaii and New Mexico excepted) waiving registration fees for trucks registered in these states in return for similar waiver of fees for Maine registered truckers.

5. Second, the State, through the Bureau of Taxation, Department of Finance and Administration, imposes a fuel tax under Title 36, Chapters 453, 457, 459 and 463. This tax is based on the number of gallons consumed by motor carriers as they operate on Maine highways. To implement this tax the State requires carriers to purchase annually a fuel use identification decal for $15.00, for each vehicle traveling on Maine highways. 29 M.R.S.A. § 246-A. Carriers are also required to report their fuel usage on a quarterly basis and pay installments toward the tax due at that time. Occasional trippers may purchase a five-day trip permit for $5.00, in lieu of purchasing an annual decal and reporting taxes quarterly.

6. Third, the State imposes a reciprocal or "mirror" tax or fee on motor carriers registered in jurisdictions that impose taxes or fees other than registration fees and fuel taxes—so-called "third structure" taxes or fees—on Maine-registered vehicles. This reciprocal tax, codified at 29 M.R.S.A. § 2243-C, was first imposed in 1983, and through 1984 was imposed only on Pennsylvania-registered carriers. Under this tax, Pennsylvania carriers must pay an annual tax of $36.00 per axle per vehicle operating in Maine, or alternatively, $25.00 for a five-day trip permit.

7. As a result of regulations promulgated in November 1984, effective January 1, 1985 the State now imposes or will impose reciprocal taxes and fees on trucks registered in 13 states. The tax in each case mirrors the so-called third structure tax which the state imposes. Most of the mirror taxes are based on truck weight or distance traveled within Maine or some combination thereof, and are paid on a quarterly basis. The installments for these weight/distance taxes will not be due until April 1, 1985. In two cases, for Pennsylvania- and Arkansas-registered carriers, the tax is a single fee per truck per annum due January 1, 1985. For the 1985 tax year, the State has thus far collected annual reciprocal taxes and fees only from Pennsylvania and Arkansas based truckers, and trip fees from Oregon carriers.

8. The Division of Commercial Vehicle and Reciprocity, in the regular course of its business, maintains records showing a carrier's purchase of fuel use identification decals or five-day trip permits under the fuel tax, as well as records showing the payment of reciprocal taxes. I have personally reviewed those records as they relate to Plaintiffs W. H. Christie & Sons, Inc. ("Christie") and Circle W ("Circle W") Transportation Co., Inc.

9. Division records pertaining to Christie show that for the year 1983, Christie purchased 13 fuel use identification decals and 5 five-day trip permits under the fuel tax. Division records show, however, that Christie paid the reciprocal tax for no more than five of its vehicles. In my experience, out-of-state carriers purchase fuel use identification decals only when they use or expect to use trucks within Maine. Based on the discrepancy between fuel decals and reciprocal taxes, I have preliminarily concluded

that in 1983 Christie incurred but did not pay reciprocal taxes due on some of its vehicles.

10. In 1984, according to Division records, Christie purchased eight fuel use identification decals and one five-day trip permit under the fuel use tax. However, Christie paid no annual reciprocal tax and paid for only one five-day permit under the reciprocal tax. Again, I preliminarily conclude from this discrepancy that in 1984 Christie incurred but did not pay reciprocal taxes due on its vehicles.

11. To date, the Division has not received any fuel decal or reciprocal tax payments from Christie for the 1985 calendar year.

12. Concerning Plaintiff Circle W, Division records reveal that Circle W paid neither fuel decal fees nor reciprocal taxes to the State in 1983.

13. In 1984, Circle W purchased 33 fuel use identification decals for its vehicles, but paid reciprocal taxes for only two of its vehicles. Based on this discrepancy, I conclude preliminarily that Circle W incurred but did not pay reciprocal taxes due and owing for 1984.

14. For calendar year 1985, Circle W has purchased 20 fuel use identification decals, but has not paid reciprocal tax. Again, this suggests that in 1985 Circle W has incurred but has not paid reciprocal taxes.

15. As noted above, the conclusions expressed are preliminary. It is possible that in the years in question both Christie and Circle W purchased more fuel decals than were required for its vehicles, and did not actually operate vehicles in Maine beyond that indicated by its reciprocal tax payments. I am informed by counsel that Defendants

through discovery have sought information from the Plaintiffs on deliveries and pick-ups within the State of Maine during 1983 and 1984. This information may be helpful in reaching a definitive conclusion as to whether Circle W and Christie have failed to pay reciprocal taxes due and owing to the State.

Dated: February 25, 1985.

/s/ Carolyn Manson

Subscribed and sworn to before me this 25th day of February, 1985.

/s/ Madeleine Pomerleau
Notary Public